IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AARON ROME,	§	
	§	
Plaintiff,	§	
v.	§	**C.A. No. 3:16-CV-02480-N**
	§	
HCC LIFE INSURANCE COMPANY and	§	
HCC SPECIALTY UNDERWRITERS, INC.	§	
	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO MODIFY ORDER

A court may modify an order to permit an interlocutory appeal when faced with a purely legal question and conflicting or murky authority, if it will expedite the case. 28 U.S.C. 1292(b). Because piecemeal appeals require "delay and extra effort," they are "exceptional." *Clark-Dietz & Assocs. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983).

Plaintiff Aaron Rome's motion to modify flunks every element. (Doc. #57). Missing is a purely legal question—instead, Rome argues these facts are particularly tricky, which provides no basis for an interlocutory appeal. *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006) ("a 'question of law' does not mean the application of settled law to disputed facts."). Absent too is any difference of opinion; the legal standard is well-established. *Meredith v. Time Insurance Company*, 980 F.2d 352, 355 (5th Cir. 1993) (establishing "a comprehensive test for determining whether a particular plan qualifies as an 'employee welfare benefit plan'"). An interlocutory appeal would only delay, not expedite, this case. And on top of all that, Rome's motion is untimely. For all these reasons, the motion should be denied.

I. FACTUAL BACKGROUND

HCC issued an insurance policy to the National Hockey League ("NHL") for the benefit of its active players. *See* June 20, 2018 District Court Mem. Op. and Order (Doc. #52) at 1. Aaron Rome, a former NHL player, asserted state law claims against HCC stemming from his claim for benefits under the policy. *Id.* at 2. HCC filed a motion to dismiss or, in the alterative, motion for summary judgment because Rome's claims were preempted by ERISA. *Id.* On June 20, 2018, the District Court granted the motion to dismiss, but permitted Rome to file an ERISA claim within 30 days. *Id.* at 9. Rome filed a First Amended Complaint asserting new claims under ERISA on July 20, 2018. (Doc. #53) at 9-10. On August 3, 2018, HCC filed its Answer to Rome's First Amended Complaint. (Doc. #55).

Meanwhile, on July 20, Rome had filed a notice of appeal purporting to appeal the Court's order granting the motion to dismiss. (Doc. #54). Defense counsel conferred with Plaintiff's counsel and asked them to withdraw the appeal because there was no final judgment or certified appeal under Section 1292(b), and thus no appellate jurisdiction. Rome refused. *See* Email Correspondence, Appx. 3. Defendants then filed a motion to dismiss for lack of jurisdiction, which the Fifth Circuit granted. Order, Appx. 4. On August 27, sixty-eight days after the Court issued its order granting the motion to dismiss, Rome moved to modify the order and to authorize an interlocutory appeal. *Compare* (Doc. #52) *with* (Doc. #57).

II. ARGUMENTS & AUTHORITIES

Usually, parties may only appeal final judgments, "avoiding the delay and extra effort of piecemeal appeals." C*lark-Dietz & Associates-Engineers, Inc. v. Basic Const. Co*., 702 F.2d 67, 69 (5th Cir. 1983); *see also* 28 U.S.C. 1291 (permitting appeals from final decisions). Interlocutory appeals, on the other hand, are "exceptional." C*lark-Dietz*, 702 F.2d at 69. To

satisfy this "narrow exception to the final judgment rule," Rome must show the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Alverson v. BL Rest. Operations LLC*, No. 5-16-CV-00849F, 2018 WL 1618341, at *3-4 (W.D. Tex. Apr. 3, 2018) (quoting 28 U.S.C. 1292(b)). Even if Rome satisfies these statutory elements and convinces the Court to exercise its discretion, the Fifth Circuit must then agree to accept the appeal. *Id.* Rome has satisfied none of the elements.

A. There is no question of pure law.

According to Rome, the controlling question of law is whether ERISA governs this insurance policy and Rome's claims. Mot. to Modify (Doc. #57) at 4. Rome argues that seven categories of facts make the analysis particularly difficult. *Id.* at 6-7. To start with, though, that is not a question of pure law under Section 1292(b). Even Rome previously admitted "[w]hether an insurance policy is governed by ERISA is a question of fact." Pl.'s Resp. to Mot. to Dismiss (Doc. #48) at 12. As the most-cited case in Rome's motion to modify makes clear, "a 'question of law' does *not* mean the application of settled law to disputed fact." *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006). "The Fifth Circuit requires that the question of law be a pure question of law; permissive interlocutory appeals are not proper for determinations that involve applications of law to fact." *Stoffels v. SBC Comms,, Inc.*, 572 F. Supp. 2d 809, 811 (W.D. Tex. 2008); *Clark-Dietz*, 702 F.2d at 69 ("fact-review questions [are] inappropriate for § 1292(b) review"); *see also generally Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 677 (7th Cir. 2000) (explaining Section 1292(b) is intended for "abstract legal issue[s]" that can be decided "without a trial record.").

For example, the Western District of Texas decided that a retirement plan was an ERISA plan. *Stoffels v. SBC Communications*, 572 F. Supp. 2d 809, 811-12 (W.D. Tex. 2008). In refusing to certify an interlocutory appeal, the district court determined that answering "whether [the retirement plan] is governed by ERISA" required applying an established legal standard to facts, which was not a question of pure law suitable for review under Section 1292(b). *Id.* As in *Stoffels*, Rome's motion should be denied for this reason alone.

B. There is no difference of opinion.

An interlocutory appeal also requires "substantial ground for difference of opinion." 28 U.S.C. 1292(b). Examples include when "a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Ryan*, 444 F. Supp. 2d at 723-24 (quoting 4 Am.Jur.2d *Appellate Review* § 128 (2005)).

When the Court is following "Fifth Circuit precedent and the majority view in the Northern District," in contrast, there is no disagreement under Section 1292(b). *St. Denis J. Villere v. Caprock Comms. Corp.*, No. 3:00-CV-1613, 2003 WL 21339286, at *1 (N.D. Tex. June 4, 2003) (Godbey, J.); *see also Lillie v. Stanford Tr. Co.*, No. 3:13-CV-3127-N, 2015 WL 13741932, at *4 (N.D. Tex. Sept. 22, 2015) (Godbey, J.) (whether plaintiffs established facts under the legal standard for secondary liability was no grounds for disagreement). In other words, applying a clear legal standard to particular facts is no basis for a difference of opinion under Section 1292(b). *Id.*; *see also Stoffels*, 572 F. Supp. 2d at 811.

Here, there is no difference of opinion. Since the Fifth Circuit "devised a comprehensive test for determining whether a particular plan qualifies as an 'employee welfare benefit plan'" in *Meredith v. Time Insurance Company*, the law has been clearly established. 980 F.2d 352, 355 (5th Cir. 1993). In fact, the standard is now so ensconced that courts reference it by shorthand—"the *Meredith* test"—like *Miranda*, *McDonnell Douglas*, *Twombly*, and *Iqbal*. *See, e.g.*, *Clayton v. ConocoPhillips Co*., 722 F.3d 279, 294 (5th Cir. 2013). Missing from the motion is even one case that applied some different legal standard. Nor does Rome cite any case that permitted an interlocutory appeal under these circumstances. Six of Rome's cited cases actually ***denied*** motions to appeal.[1] Of the only two cases that actually granted motions to appeal, the first concerned an obscure, complex question of foreign law: whether U.S. courts have jurisdiction over the Palestine Liberation Organization. *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 23 (2d Cir. 1990). The second decided another obscure question of first impression under the Defense Base Act, in which the only authority came from other courts construing similar statutes. *Fisher v. Halliburton*, 667 F.3d 602, 606 (5th Cir. 2012). In contrast, Fifth Circuit and Northern District case law provide a clear roadmap here. *See* June 20, 2018 District Court Mem. Op. and Order (Doc. #52) at 4.

C. An interlocutory appeal would only delay the ultimate termination of the litigation.

Another requirement is that the interlocutory appeal would "materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b); *see also Ryan v.*, 444 F. Supp. 2d 723 (a *controlling* question means, at minimum, "a question of law the resolution of which could

[1] *Ryan v. Flowserve Corp*., 444 F. Supp. 2d 718, 730 (N.D. Tex. 2006) (denying motion to certify*); Strougo v. Scudder*, No. 96-civ-2136, 1997 WL 473566, at *8 (S.D.N.Y. Aug. 18, 1997) (same); *S.E.C. v. Credit Bancorp*, Ltd., 103 F. Supp. 2d 223, 228 (S.D.N.Y. 2000) (same); *B&B Advisory Services, LLC v. Bombardier Aerospace Corp*., CIV.A. 02-2695, 2003 WL 22326511, at *2 (E.D. La. Oct. 9, 2003) (same); *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000) (same); *Coates v. Brazoria County Tex*., 919 F. Supp. 2d 863, 872 (S.D. Tex. 2013) (same).

materially advance the ultimate termination of the litigation—thereby saving time and expense for the court and the litigants."). An appeal that might require the movant to re-plead and thus may "materially retard the ultimate termination of the litigation" does not satisfy this element. *St. Denis J. Villere & Co*., 2003 WL 21339286, at *1 (Godbey, J.).

An interlocutory appeal would only delay this case. Rome has already filed an amended complaint that asserts ERISA claims and Defendants have filed an amended answer. (Doc. #53) & (Doc. #55). Rome's motion to modify does not request a stay. (Doc. #57). Granting the motion to modify would therefore require Defendants to litigate Rome's ERISA claims, while simultaneously permitting him to file an interlocutory appeal and potentially return to square one with his original state law claims. By side-tracking this litigation, an interlocutory appeal would prejudice Defendants and waste the Court's time and resources.

D. The motion is untimely.

As yet another reason to deny the motion, it is untimely. Although Section 1292(b) includes no express deadline for filing a motion to modify, it requires filing an application for permission to appeal to the Court of Appeals within ten days of the District Court entering an appealable order. 28 U.S.C. 1292(b). Granting a motion to modify after an unexplained, unreasonable delay undermines the statute's 10-day deadline and its purpose of expediting the case. *Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990) (Posner, J.); *Teladoc, Inc. v. Texas Med. Bd.*, 1:15-CV-343-RP, 2016 WL 4362208, at *3 (W.D. Tex. Aug. 15, 2016) (collecting cases). Even a thirty day delay can suffice to deny a motion to modify as untimely. *Morton Coll. Bd. of Trustees of Illinois Cmty. Coll*, 25 F. Supp. 2d 882, 885 (N.D. Ill. 1998) (thirty-day delay untimely); *see also Fabricant v. Sears Roebuck & Co*., 98-1281-CIV-NESBITT, 2001 WL 883303, at *1 (S.D. Fla. Jan. 29, 2001) (forty-six delay untimely); *Green v. City of New York*,

No. 05-cv-0429, 2006 WL 3335051, at *2 (E.D.N.Y. Oct. 23, 2006) (two-month delay untimely).

There is no justification for Rome waiting sixty-eight days before moving to modify. The only activity during that period was Rome pursuing an improper Fifth Circuit appeal, without attempting to establish any basis for appellate jurisdiction. When Defense counsel pointed out the problem, Rome refused to withdraw the appeal, requiring Defendants to file a motion to dismiss and a three-judge panel to state the obvious (an appeal requires jurisdiction). Rome's bungled Fifth Circuit appeal does not justify his untimely motion to modify.

III. CONCLUSION

For these reasons, Defendants respectfully request that the Court deny the motion to modify and grant Defendants any additional relief the Court determines is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 1, 2018, I electronically filed the foregoing document with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. Service on all attorneys of record who are Filing Users will be automatically accomplished through notice of electronic filing.

/s/ Parker Graham